

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2003-348

September 30, 2003

MAINE PUBLIC UTILITIES COMMISSION
Investigation into the Conservation Fund
Assessments of the Consumer-Owned
Utilities

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TEMPORARY
PROTECTIVE ORDER NO. 1
Specific Customer Data

In response to the Oral Data Request made during a conference call in this proceeding on September 26, a representative of the consumer-owned utilities has been asked to provide certain customer specific information that the COUs consider to be confidential (*namely the kWh usage of customers with a demand of 500 kW or greater*).

Many parties in Commission proceedings have maintained in the past that information of this kind constitutes trade secrets, that it has value to competitors and that its release would be damaging to the interests of the utility and its customers. Section 1311-A (1)(A) of Title 35-A of the Maine Revised Statutes grants the Commission the authority to issue protective orders to protect the interests of parties in confidential or proprietary information, trade secrets, or similar matters as provided by the Maine Rules of Civil Procedure, Rule 26(c). Hearing Examiners and the Commission have been sensitive to those concerns. See, e.g., Docket No. 2002-770, Temporary Protective Order No. 1 – Specific Customer Data in Re: Maine Public Utilities Commission Investigation of Central Maine Power Company’s Stranded Cost Rates and Request for Accounting Order, Docket No. 2001-232, Temporary Protective Order No. 1 - Specific Customer Data in Re: Maine Public Utilities Commission, Investigation of Central Maine Power Company’s Stranded Cost Revenue Requirement, and Docket No. 97-580, Hearing Examiners’ Protective Order No. 3 – Specific Customer Data in Re: Central Maine Power Company, Investigation of Stranded Costs, Transmission and Distribution Utility Revenue Requirements and Rate Design. In those cases, the information was released only to certain parties.

The COUs have agreed to produce customer-specific information and documents on the condition that a protective scheme be implemented similar to that used in the above-cited proceedings for that kind of information. Any party at any time can move for a finding that material subject to protection should no longer be protected or that the other party should be provided access to the protected information pursuant to protective provisions. Unless such a motion is granted, however, use of the allegedly confidential materials continues to be restricted by the terms of this Protective Order No. 1.

In order to expedite the provision of this information to the Commission and subject to reconsideration in light of arguments by any intervenors, the Examiner conclude that the limited and revocable protection requested by CMP is warranted under 35-A M.R.S.A. § 1311-A and Rule 26(c) of the Maine Rules of Civil Procedure.

The Examiner has instructed the COU representative to provide the Designated Confidential Information to the Commission and OPA, and to withhold the Designated Confidential Information from counsel of other parties until it is determined that counsel desires to obtain the information and that counsel agree to the conditions stated in this Order and section 1311-A.

Accordingly, it is

O R D E R E D

1. That information pertaining to specific customer data shall be considered "Designated Confidential Information" for purposes of this Order and, until this Order is modified, access to Designated Confidential Information shall be limited as described in Paragraph 4 below.
2. That all Designated Confidential Information shall, unless removed from the coverage of this Order as provided in paragraph 3 below, be and remain confidential. Designated Confidential Information shall not be disclosed for any purpose other than the purposes of this proceeding, and then solely in accordance with this Order. No person to whom access to Designated Confidential Information is accorded pursuant to paragraph 4 of this Order shall disclose or reveal, directly or indirectly, the content of the Designated Confidential Information to others, except as provided in paragraph 4.
3. That the parties to whom Designated Confidential Information is furnished may challenge designation of any documents or other information as confidential by motion to the Commission and upon reasonable prior notice to the parties and an opportunity for hearing. Upon the entry of an order granting such a motion, the provisions and restrictions of this Order shall cease to bind any party or other person with respect to the documents or information that the Order granting the motion shall have expressly and clearly removed from the coverage of this Order.
4. That, until this Order is modified, access to Designated Confidential Information shall be limited to (i) Commission members, members of the Commission Staff and their consultants; (ii) the Public Advocate, counsel and their consultants; (iii) a stenographer or reporter recording any hearing in connection with this proceeding; (iv) counsel for or any other representative of the consumer-owned utilities; and (v) counsel for all parties (not including counsel for or interested parties), provided that such counsel shall agree to use the Designated Confidential Information solely for purposes of this proceeding and not disclose the information to any other person and provided further, the attorney does not have "a personal and substantial financial interest that could be benefited by access to the information to the detriment of the party that provided the information." 35-A M.R.S.A. §1311-A(1)(D)(2).

5. That no copies of Designated Confidential Information furnished by the consumer-owned utilities shall be circulated to persons other than those persons who are authorized under paragraph 4 of this Order to obtain Designated Confidential Information. Documents offered in evidence may be copied as necessary for that purpose. Persons authorized under paragraph 4 hereof also may take such notes as may be necessary solely for the purposes of this proceeding. Those notes shall also be treated as Designated Confidential Information.
6. All materials claimed by a consumer-owned utility to be Designated Confidential Information under the terms of this Order shall be clearly marked "confidential" by the COU. In the case of documents, each page of any such document shall be stamped "confidential" in bold lettering in the upper right hand corner of each page including the cover letter. Any document or portion thereof not clearly and conspicuously marked "confidential" in bold lettering shall not be protected under the terms of this Order. Faxed materials should be marked as any other confidential document. With regard to other media, diskettes should be marked "confidential" on the outside and each file on the diskette should be similarly identified. Any person or party subject to the terms of this Order who receives unmarked documents or materials which he/she believes a COU intended to be protected by the terms of this Order, and that would have been protected if marked in accordance with this paragraph, shall make a good faith effort to notify the COU of this fact and to avoid use of such documents or materials in a manner inconsistent with protection of such material under this Order.
7. That the restrictions upon, and obligations accruing to, persons who become subject to this Order shall not apply to any Designated Confidential Information submitted in accordance with paragraph 1 of this Order if the Commission rules, after reasonable notice and hearing, that the Designated Confidential Information was publicly known at the time it was furnished or has since become publicly known through no fault of the receiving party.
8. That where reference to Designated Confidential Information is required in pleadings, briefs, other legal documents, or argument, the reference shall be by citation of title or exhibit number only or by some other non-confidential description to the extent possible. In those circumstances, counsel shall make every reasonable effort to preserve the confidentiality of material in the sealed record. If counsel shall include Designated Confidential Information in pleadings, briefs, other legal documents, or arguments, that portion of the documents or that portion of the transcript of the argument containing Designated Confidential Information shall be maintained under seal.
9. That the Commission may draw upon all Designated Confidential Information in the record in the deliberation of any decision or order that it may issue, but the Commission will avoid the reproduction in its decision of any Designated Confidential Information.

10. That should any appeal of, or other challenge to, the Commission's decision in this proceeding be taken, any portions of the record that have been sealed in accordance with paragraph 7 above shall be forwarded to the courts of this State in accordance with applicable law and procedures, but under seal and so designated in writing for the information of the court.
11. That this Order does not preclude any party from (a) objecting under the Maine Rules of Evidence to the admissibility of any Designated Confidential Information produced by a consumer-owned utility or (b) objecting, on any substantive or procedural ground, to any subsequent data request or other request for information.
12. That a COU may, at its option, provide to each person having access to Designated Confidential Information a copy of this Order and require each person to agree in writing to the terms hereof prior to obtaining access to the Designated Confidential Information.
13. That Designated Confidential Information made available pursuant to this Order and made part of the record in any proceeding before the Commission shall remain in the possession of the Commission, under seal, and subject to the protective requirements of this Order, until this Commission or its authorized presiding officer shall otherwise order.
14. That this Order may be modified on motion of any party or on the Commission's own motion upon reasonable prior notice to the parties and an opportunity for hearing.
15. Copies of Designated Confidential Information and documents, notes and other materials containing or reflecting, directly or indirectly, the Designated Confidential Information, that are in the possession of Commission members, counsel or employees of the Commission may be retained by those persons for the purpose of performing those persons' duties and obligations. If retained, the Designated Confidential Information shall be subject to this Protective Order or to a protective order issued in another proceeding in which the Designated Confidential Information is used. If a Commission member, counsel or employee of the Commission does not retain the Designated Confidential Information, that person shall destroy it as provided in this paragraph. Within 40 days after the Commission reaches a final decision (i.e., unappealable) in this proceeding, each other party and Commission independent consultants and experts retained by the Commission to whom Designated Confidential Information has been made available shall destroy all documents, notes and other materials containing or reflecting, directly or indirectly, the Designated Confidential Information. Audio, video or other such magnetically recorded materials shall be electronically erased before disposal. Documents shall be shredded.

Dated at Augusta, Maine, this 30th day of September, 2003.

BY ORDER OF THE HEARING EXAMINER
